IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JASON EARL TIBBETTS,
Appellant.

No. 2 CA-CR 2015-0216
Filed May 6, 2016

Appeal from the Superior Court in Pinal County
No. S1100CR201401109
The Honorable Joseph R. Georgini, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Jonathan Bass, Assistant Attorney General, Tucson
Counsel for Appellee

Heard Law Firm, Mesa
By James L. Heard
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, Jason Tibbetts was convicted of luring a minor for sexual exploitation and sexual exploitation of a minor. The trial court sentenced him to aggravated, concurrent terms of imprisonment, the longer of which is twelve years. On appeal, Tibbetts contends the court erred in precluding evidence to impeach the minor victim based on the rape-shield law, A.R.S. § 13-1421. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding Tibbetts's convictions. *See State v. Allen*, 235 Ariz. 72, ¶ 2, 326 P.3d 339, 341 (App. 2014). Tibbetts and K.C. met in an online chatroom but, shortly thereafter, began communicating through telephone calls and text messages. K.C. told Tibbets she was seventeen years old. Tibbets was thirty-nine years old. K.C. has a genetic disorder and is moderately mentally handicapped. Initially, Tibbetts and K.C. talked about "life and school." Later, Tibbetts asked K.C. to call him "dad" and to send him naked pictures of herself, which she did. They also discussed having sex, getting married, and having children.

¶3 When accompanying her father on a work trip, K.C. arranged to meet Tibbetts at the restaurant where he worked. At the restaurant, Tibbetts sat down at a table with K.C. and her father, who did not know about his daughter's communications with Tibbetts and thought Tibbetts was the owner. However, when Tibbetts put his hand on K.C.'s leg, her father asked for the check. Tibbetts walked them out and kissed K.C. before they left. K.C. subsequently told her father how she had met Tibbetts, and her

father confiscated the iPod that she had been using to communicate with him.

¶4 A few days later, while she was home alone, K.C. called Tibbetts and arranged to go live with him. She left her house with a suitcase full of her belongings, but Tibbetts never came to pick her up. A woman saw K.C. standing on the side of the street and called the police.

¶5 A grand jury indicted Tibbetts for luring a minor for sexual exploitation and sexual exploitation of a minor. At trial, Tibbetts sought to question K.C. about statements she had made in text messages claiming she had sex with someone named Jake in California.[1] Relying on the rape-shield law, the court precluded "any questions regarding [K.C.'s] chastity or . . . sexual history." However, Tibbetts argued that the questions went "to the truthfulness of the . . . victim . . . , not to her chastity [or] whether . . . there was ever a sexual relationship" because, based on testimony from K.C.'s mother, her story was "impossible, false." In response, the state argued that the incident was nonetheless "a specific instance of sexual history" precluded by the rape-shield law. The court agreed with the state but gave Tibbetts discretion to ask general questions to challenge K.C.'s credibility.

¶6 Tibbets was convicted as charged, and the trial court sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶7 Tibbetts maintains the trial court erred in precluding, based on the rape-shield law, testimony from K.C. about having sex with Jake. He argues "the testimony would have likely shown that

[1]This issue apparently was first presented to the court at a hearing before trial; however, we do not have a transcript of that hearing. *See State v. Printz*, 125 Ariz. 300, 304, 609 P.2d 570, 574 (1980) (where matters not included in record on appeal, we presume missing portions support trial court's decision).

[K.C.] could not have had any prior sexual history and that her credibility should be questioned." He further asserts that the rape-shield law does not apply because "[t]he issue here is not the extent of the victim's prior sexual history, but rather the lack thereof." We review a trial court's evidentiary decisions for an abuse of discretion. *State v. Payne*, 233 Ariz. 484, ¶ 49, 314 P.3d 1239, 1257 (2013); *see also State v. Herrera*, 232 Ariz. 536, ¶ 38, 307 P.3d 103, 116 (App. 2013).

¶8 Section 13-1421 is commonly referred to as the rape-shield law. *Herrera*, 232 Ariz. 536, ¶ 38, 307 P.3d at 116. Subsection (A) provides:

> Evidence relating to a victim's reputation for chastity and opinion evidence relating to a victim's chastity are not admissible in any prosecution for any offense in this chapter. Evidence of specific instances of the victim's prior sexual conduct may be admitted only if a judge finds the evidence is relevant and is material to a fact in issue in the case and that the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence, and if the evidence is one of the following:
>
> 1. Evidence of the victim's past sexual conduct with the defendant.
>
> 2. Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease or trauma.
>
> 3. Evidence that supports a claim that the victim has a motive in accusing the defendant of the crime.
>
> 4. Evidence offered for the purpose of impeachment when the prosecutor puts the victim's prior sexual conduct in issue.

> 5. Evidence of false allegations of sexual misconduct made by the victim against others.

¶9 In this case, the evidence is a statement made by K.C. that she had sex with someone named Jake in California. Tibbetts maintains he should have been allowed to introduce the evidence for impeachment purposes to attack K.C.'s credibility. The state responds that the trial court did not err in applying the rape-shield law because the statute "governs *all* evidence relating to a minor's prior sexual conduct" and none of the enumerated exceptions apply. Specifically, the state argues that it did not raise K.C.'s prior sexual conduct as an issue at trial; therefore, the evidence was not admissible for impeachment purposes under § 13-1421(A)(4).

¶10 We need not resolve whether the rape-shield law applies in this case because, even if the trial court erred in precluding the evidence, we "'will not reverse a conviction if an error is clearly harmless.'" *State v. Green*, 200 Ariz. 496, ¶ 21, 29 P.3d 271, 276 (2001), *quoting State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998). "Error is harmless if we can say beyond a reasonable doubt that it did not affect or contribute to the verdict." *Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d at 1176. In determining if the preclusion of evidence was harmless, we consider whether the evidence was "of a collateral nature." *State v. Warren*, 124 Ariz. 396, 403, 604 P.2d 660, 667 (App. 1979). We may also look to see whether the evidence would have been "merely cumulative" or whether "there was other 'overwhelming' evidence of the defendant's guilt." *State v. Carlos*, 199 Ariz. 273, ¶ 24, 17 P.3d 118, 124 (App. 2001), *quoting State v. Fuller*, 143 Ariz. 571, 574, 694 P.2d 1185, 1188 (1985).

¶11 Here, the evidence Tibbets wanted to introduce was collateral. *See State v. Lopez*, 234 Ariz. 465, ¶ 25, 323 P.3d 748, 753 (App. 2014) ("'Evidence is collateral if it could not properly be offered for any purpose independent of the contradiction.'"), *quoting State v. Hill*, 174 Ariz. 313, 325, 848 P.2d 1375, 1387 (1993). Tibbetts sought to impeach K.C. by showing she lied about having sex with Jake. But such evidence had no bearing on whether Tibbetts was guilty of the charged offenses. *See* A.R.S. §§ 13-3553(A)(2), 13-3554(A); *see also* Ariz. R. Evid. 401 (evidence is relevant if it has any

tendency to make fact that is of consequence more or less probable). And it was not relevant to his insufficient-evidence defense.[2] At trial, Tibbetts explained that he wanted to introduce the evidence to challenge K.C.'s "truthfulness."

¶12 The evidence was also cumulative because the jury heard testimony that K.C. had lied about other aspects of the claimed incident with Jake. *See State v. Kennedy*, 122 Ariz. 22, 26, 592 P.2d 1288, 1292 (App. 1979) ("[C]umulative evidence merely augments or tends to establish a point already proved by other evidence."). Specifically, K.C. testified she remembered telling Tibbetts about Jake but she did not actually know anyone by that name in California.

¶13 Moreover, there was overwhelming evidence of Tibbetts's guilt. In a post-arrest interview, Tibbetts admitted to officers that he knew K.C. was seventeen years old. The evidence also included some of the sexual text messages exchanged between Tibbetts and K.C. The messages show Tibbetts soliciting sexual photographs, which K.C. then sent, revealing herself in various "states of undress." We are therefore satisfied beyond a reasonable doubt that any error in precluding Tibbets from impeaching K.C. in this manner was harmless. *See Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d at 1176.

Disposition

¶14 For the foregoing reasons, we affirm Tibbetts's convictions and sentences.

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[2]As the state points out, the opening statements and closing arguments are not part of our record on appeal. *See* Ariz. R. Crim. P. 31.8(b)(2)(ii) (opening and closing not included in record unless specifically designated). Consequently, we cannot discern whether Tibbetts presented any defense other than the sufficiency of the evidence, which was listed on his pretrial notice of defenses.